Supreme Court, U. S.
FILED
JAN 23 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1042

DAVID B. TERK,
Appellant,

vs.

LADD S. GORDON, Individually and As the Director of the Department of Game and Fish, State of New Mexico; FLOYD TODD, ALBERT J. BLACK, ROBERT H. FORREST, HOUSTON McKENZIE, and EDDIE MUNOZ, Individually and As Members of the State Game Commission, State of New Mexico,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

DANIEL E. DUNCAN
3636 Menaul Boulevard, N. E. # 102
Albuquerque, New Mexico 87110
Telephone: (505) 265-7979
Attorney for Appellant

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

STATEMENT AS TO JURISDICTION 1
OPINION BELOW 2
JURISDICTION 2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 3
QUESTION PRESENTED 3
STATEMENT OF THE CASE 3
THE QUESTION PRESENTED IS SUBSTANTIAL 6
THIS CASE IS NOT MOOT 24
CONCLUSION 24
APPENDIX A—Memorandum Opinion A1
APPENDIX B—Judgment and Order A16
APPENDIX C—Notice of Appeal A18
APPENDIX D—Section 53-3-6 (as it existed in 1974 *and* as amended in 1977) A20

Citations

CASES

Allied Stores of Ohio, Inc. v. *Bowers*, 358 U.S. 522 (1959) 11
Austin v. *New Hampshire*, 420 U.S. 656 (1975) 6, 11
Baldwin, et al. v. *Fish and Game Commission of the State of Montana*, Supreme Court No. 76-1150 6
Brown v. *Anderson*, 202 F.Supp. 96 (D. Alaska, 1962) 20
Clarke v. *Redeker*, 259 F.Supp. 117 (1966) 15, 16
Corfield v. *Coryell*, 4 Wash. CC 371, F. Cas. No. 3230 (1823) 19
Geer v. *State*, 161 U.S. 793 (1895) 19

Grosjean v. *American Press Company*, 297 U.S. 233 (1936) 10
LeClair v. *Swift*, 76 F.Supp. 729 (1948) 20
Lehnhausen v. *Lake Shore Auto Parts Co.*, 410 U.S. 359 10
Massachusetts v. *Westcott*, Supreme Court No. 75-1775 6
McCready v. *Virginia*, 94 U.S. 391 (1876) 19
Michigan-Wisconsin Pipe Line Company v. *Calvert*, 347 U.S. 157 (1954) 10
Mullaney v. *Anderson*, 242 U.S. 415 (1952) 13
Roe v. *Wade*, 410 U.S. 113 (1973) 24
Russo v. *Reed*, 93 F.Supp. 554 (1950) 20
Schakel v. *State*, 513 P.2d 412 (1973) 20, 22, 23
Southern Pacific Terminal Company v. *I.C.C.*, 219 U.S. 498 (1911) 24
Starns v. *Malkerson*, 326 F.Supp. 234 (D. Minn. 1970), aff'd per curiam 401 U.S. 985 (1971) 15, 16
State v. *Heffernan*, 67 P.2d 240, 41 N.M. 219 (1936) 20
State v. *Jack*, 539 P.2d 726 (1975) 20, 23
Sturgis v. *Washington*, 368 F.Supp. 38 (1973) 15, 17
Travis v. *Yale & Tone Mfg. Co.*, 252 U.S. 60 (1920) 11
Toomer v. *Witsell*, 334 U.S. 385 (1948) 12, 13, 20, 21, 22

STATUTES

United States Constitution, Article IV, Section 2 ..... 2, 3, 4, 20, 21
United States Constitution, Amendment XIV 2, 3, 4, 11, 21
16 U.S.C. 669, et seq. 7
16 U.S.C. 777, et seq. 8
28 U.S.C. 1253 3
28 U.S.C. 1343(3) 2
28 U.S.C. 2201 4
28 U.S.C. 2202 4

28 U.S.C. 2281 2
42 U.S.C. 1983 ..... 2, 3, 4
42 U.S.C. 2201 2
42 U.S.C. 2202 2
N.M.S.A. 1953 Comp., as amended, § 53-1-1, et seq. 2, 18
N.M.S.A. 1953 Comp., as amended, §§ 53-1-1 through 53-6-11 6
N.M.S.A. 1953 Comp., as amended, § 53-2-50, et seq. 7
N.M.S.A. 1953 Comp., as amended, § 53-3-5 5
N.M.S.A. 1953 Comp., as amended, § 53-3-6 ..... 3, 4, 5, 9, 24
N.M.S.A. 1953 Comp., as amended, § 64-36-1, et seq. 7
Federal Endangered Species Act 1973—
Title 7, § 136 7
Title 16, §§ 460k-1, 460l-9, 668dd, 715i, 715s, 1362, 1371, 1372, 1402, 1531-1543 7

MISCELLANEOUS

Supreme Court Rules—
13(2) 1
15 1
Senate Report No. 91-1289 (1970 U.S. Code—Congressional and Administrative News 4353) 8

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

DAVID B. TERK,
Appellant,

vs.

LADD S. GORDON, Individually and As the Director of the Department of Game and Fish, State of New Mexico; FLOYD TODD, ALBERT J. BLACK, ROBERT H. FORREST, HOUSTON McKENZIE, and EDDIE MUNOZ, Individually and As Members of the State Game Commission, State of New Mexico,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

STATEMENT AS TO JURISDICTION

The Appellant, pursuant to the United States Supreme Court Rules 13(2) and 15, files this Statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct Appeal to review the Final Order of the Statutory District Court and to exercise jurisdiction in this case.

OPINION BELOW

The Statutory District Court for the District of New Mexico issued its opinion in this case on August 25, 1977. The opinion is not reported and has been attached hereto as an appendix. The Judgment and Order of the Statutory District Court was filed on October 28, 1977 and the Appellant filed his Notice of Appeal to the Supreme Court of the United States on November 25, 1977; the Judgment and Order and Notice of Appeal are attached hereto as appendices.

JURISDICTION

This action was instituted on August 12, 1974, pursuant to Title 42, U.S.C., §§2201 and 2202; Title 28, U.S.C., §1343 (3); Title 42, U.S.C., §1983; Title 28, U.S.C., §2281; and Article IV, §2 (Privileges and Immunities) and the Fourteenth Amendment to the United States Constitution. The Appellant challenged the Constitutionality of the license fee system and regulations, policies, practices, customs and usages of the State of New Mexico to the hunting of game animals (§53-1-1, et seq., N.M.S.A. 1953 Comp., as amended). On October 28, 1977 the Statutory District Court entered its Judgment and Order whereby the Defendants were permanently enjoined from enforcing any statute, regulation, policy, practice, custom or usage which unequally allocates available hunting licenses between residents and non-residents of the State of New Mexico for certain specified game species. The Court further, however, denied the Appellant's claims for relief regarding the greater fee charged non-residents of the State of New Mexico for hunting licenses.

The jurisdiction of the Supreme Court to review the Judgment and Order of the Statutory District Court, by direct Appeal, is conferred by Title 28, U.S.C., §1253.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in this case are Article IV, §2 of the United States Constitution and the Fourteenth Amendment to the United States Constitution. The Statutory provisions involved are §53-3-6 (N.M.S.A. 1953 Comp., as amended). The text of §53-3-6 is reprinted in the Appendix to this Jurisdictional Statement.

QUESTION PRESENTED

Whether the New Mexico Statutory structure regarding and relating to hunting license fees to hunt game animals in the State of New Mexico, whereby non-resident hunters are charged license fees which are substantially greater than license fees charged hunters who are residents of the State of New Mexico, denies privileges and rights guaranteed the non-residents pursuant to Article IV, §2 of the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States and Title 42, U.S.C., §1983.

STATEMENT OF THE CASE

This action was filed in the United States District Court for the District of New Mexico on August 12, 1974. The Plaintiff-Appellant Terk was and is a citizen of the

United States and a resident of the State of Texas. The Appellee Gordon was the Director of the New Mexico State Department of Game and Fish and the remaining Appellees were members of the New Mexico State Game Commission.

Appellant challenged the constitutionality of the New Mexico Statutory hunting license fee scheme set forth in §53-3-6 (N.M.S.A. 1953 Comp., as amended) which imposed a substantially greater license fee upon non-resident hunters than placed upon resident hunters. Appellant additionally challenged the constitutionality of the regulations, customs, and policies of the New Mexico State Department of Game and Fish and the New Mexico State Game Commission whereby available hunting licenses for certain game species were unequally allocated between non-resident and resident hunters. Appellant contends that the foregoing license fee structure and the unequal allocation process represent gross and invidious discrimination against non-resident hunters.

The challenge of Appellant is based upon the Privileges and Immunities Clause of Article IV, §2 of the United States Constitution, the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, and deprivation of Civil Rights guaranteed by Title 42, U.S.C., §1983.

The Complaint of the Plaintiff-Appellant as amended by interlineation on August 13, 1974, sought a Declaratory Judgment, pursuant to Title 28, U.S.C., §§2201 and 2202, that the said statutory license fee structure and the regulations, customs and policies aforesaid were unconstitutional and an injunction against enforcement of the statutory scheme, regulations, customs, and policies.

On September 19, 1974, pursuant to Title 28, U.S.C., §2281, a Statutory Three-Judge District Court was convened and consisted of the following:

Honorable Oliver Seth, United States Circuit Judge;

Honorable Howard C. Bratton, United States District Judge; and

Honorable E. L. Mechem, United States District Judge.

The facts and law regarding the suit were presented to the Court by way of Stipulation and Briefs; oral argument was held on July 29, 1975.

The District Court rendered its Memorandum Opinion on August 25, 1977 and in accordance with such Opinion, the District Court entered its Judgment and Order on October 28, 1977. The Court held, "We conclude, therefore, that the allocation of licenses between residents and non-residents cannot be upheld." (Opinion, page A15). The Court further held, "We conclude, therefore, that the present fee structure in N.M.S.A. 53-3-5 (1953 Comp.) is not offensive to the Constitution." (Opinion, page A14). (It should be noted that the reference to §53-3-5 is a typographical error, as the license fee structure is set forth in §53-3-6 and references are made to the correct statutory citation on pages A2 and A7 of the Opinion.)

The Judgment and Order entered by the Court permanently enjoined the Defendants, their successors, officers, employees and agents from enforcing any statute, regulation, policy, practice, custom or usage which unequally allocates available licenses for certain game species. The Judgment and Order further denies the Appellant's prayer requesting that the Defendants, etc., be enjoined from charging non-resident hunters a greater fee for hunting licenses. The Court held, "We feel the State has

made a sufficient showing that non-residents receive the benefits of State General Fund expenditures which justified the fee differential." (Opinion, page A13).

THE QUESTION PRESENTED IS SUBSTANTIAL

Appellant contends that the issues involved herein represent substantial questions warranting the acceptance of jurisdiction. Appellant notes that this Court has accepted jurisdiction of *Baldwin, et al.* v. *Fish and Game Commission of the State of Montana,* Supreme Court No. 76-1150, and *Massachusetts* v. *Westcott,* Supreme Court No. 75-1775, both cases of which deal with issues similar to the present case. Appellant challenges a statutory scheme of the State of New Mexico which arbitrarily discriminates against non-resident hunters desiring to hunt game animals in the State of New Mexico. Appellant argues that the discrimination in issue here is based solely upon non-residency. The Privileges and Immunities Clause makes non-citizenship or non-residence an improper basis for locating a special burden. Additionally, this gives rise to questions relating to the "maintenance of our Constitutional Federalism". *Austin* v. *New Hampshire,* 420 U.S. 656 (1975).

There are thirty-two million acres of land in the State of New Mexico which are opened to free public hunting. More than seventy per cent of that land is National Forest or public-domain land administered by the Bureau of Land Management. Thus, a large proportion of the hunting areas are on National Forests and Bureau of Land Management lands.

Pursuant to State Law, §53-1-1 through §53-6-11 (N.M.S.A. 1953, as amended), the New Mexico State Game

Commission is granted certain powers, authorities, and duties regarding game animals and fish in the State of New Mexico. The New Mexico State Game Commission acts through the New Mexico Department of Game and Fish and effectively, the Department of Game and Fish is the "action arm" of the State Game Commission. The State Game Commission implements rules and regulations under its statutory authority, and such rules and regulations are enforced by the Department of Game and Fish. Such entities are interrelated and closely connected; for this reason, for ease of reference, the two entities will be referred to collectively hereinafter as "Department".

The Department is financially autonomous and for the five fiscal years prior to institution of the Appellant's lawsuit, with two very minor exceptions, the Department received no General Funds from the State of New Mexico. Exceptions are funds received through the Snow Mobile Act, §64-36-1, et seq. (N.M.S.A. 1953, as amended) and the Wildlife Conservation Act, §53-2-50, et seq. (N.M.S.A. 1953, as amended). Funds appropriated under the terms of the Snow Mobile Act have no application to wildlife management and are merely an appropriation of snow mobile license fees back to the Department. The Department received a $45,000.00 General Fund Appropriation in Fiscal Year 1973-1974 in order to implement the Act and to conform with the Federal Endangered Species Act of 1973 (Title 7, §136; Title 16, §§460k-1, 460l-9, 668dd, 715i, 715s, 1362, 1371, 1372, 1402, 1531-1543). The Department was to receive Federal Matching Funds under the Pittman-Robertson Act, Title 16, U.S.C., §669, et seq. Such appropriations were to be utilized for management and protection of endangered species and *non-game* animals. They were and could not be utilized for the management of game animals and/or fish. In light of the fact that

the total receipts for the Department for the Fiscal Year 1973-1974 were in excess of 4.3 Million Dollars, the General Fund Appropriation was quite minimal.

The Department receives substantial Federal funds, including Pittman-Robertson Funds and funds from the Dingell-Johnson Act, Title 16, U.S.C., §777, et seq. Federal funds received by the Department are substantial; for the Fiscal Years 1971-1972, 1972-1973, and 1973-1974, Federal fund reimbursements have represented between eighteen and nineteen per cent of the total receipts of the Department. The source of the Pittman-Robertson funds is a Federal Excise Tax on hunting equipment and the source of the Dingell-Johnson funds is a Federal Tax on sport fishing equipment. Such taxes are paid by all United States Citizens, regardless of their state of residence. It is indicated in Senate Report No. 91-1289 (1970 U.S. Code-Congressional and Administrative News 4353), that over thirty million citizens of this Country participate in the sports of fishing and hunting each year. Through Fiscal year 1969 the Pittman-Robertson Act has made available over 355 Million Dollars to State Fish and Game Departments for wildlife restoration projects and the Dingell-Johnson Act has made available through the same period funds in excess of 101 Million Dollars.

Both Acts provide payment of these funds, on a sharing basis, to State Game and Fish Departments based upon a specified allocation formula. With regard to the Pittman-Robertson Act, the formula considers the size of the state and the *number of licenses issued.* With regard to the Dingell-Johnson Act, the formula considers the area of waters and the *number of licenses issued.* With this background, it should be noted that in Fiscal Years 1971-1972 and 1972-1973, forty-three per cent of all hunting and fishing licenses issued in the State of New Mexico were

issued to non-resident hunters and fishermen. Thus, the non-resident hunters and fishermen greatly enhance the ability of the Department to receive Federal matching funds through the Pittman-Robertson and Dingell-Johnson Acts. Likewise, for the Fiscal Years 1971-1972 and 1972-1973, non-resident hunters and fishermen paid 32.5 per cent and 34.3 per cent, respectively, of the total license fee receipts that the Department received for those fiscal years. It is further interesting to note that for Fiscal Years 1971-1972 and 1972-1973 the Federal fund reimbursements and license fees paid by non-residents represented 44.3 per cent and 45.3 per cent, respectively, of *all* of the receipts of the Department.

Thus, although New Mexico is a member of a Nation of States and receives substantial support in various forms for its big game hunting and fishing programs from the Federal Government (and therefore all the citizens of the Nation) and substantial monies from non-resident fees (although at an excessive rate), the State feels free to place whatever financial and other burdens upon non-residents that it alone deems appropriate. It is clear that the State of New Mexico intends to continue its discriminatory practices against the non-residents, as §53-3-6 (N.M.S.A. 1953 Comp., as amended) has, since institution of this suit, again increased, on a greater proportion basis than residents, the fees charged non-residents. (A copy of the Amended §53-3-6 is attached as an Appendix.)

Although Appellant questions the continued viability of the so-called "ownership doctrine", it is admitted that the Appellees have the authority, pursuant to the State's police power, to manage its big game. However, Appellant does challenge the power and authority of the State of New Mexico to charge unequal license fees, solely on the basis of non-residence. Clearly, as alluded to above, all

citizens of this Nation make significant contributions to the hunting and fishing in the State of New Mexico. Substantial Federal funds are provided the Department and substantial Federal lands are utilized as game habitats in the State of New Mexico. Yet, the lower Court's Opinion apparently placed no limitations upon the State of New Mexico regarding non-resident license fees. This attacks the very fabric of our Federal system and clearly runs contrary to the Privileges and Immunities Clause and Equal Protection Clause of the United States Constitution.

The Constitutional concern of the United States Supreme Court relating to discrimination by a State against non-residents was set forth in *Austin* v. *New Hampshire*, supra as follows:

> In resolving Constitutional challenges to state tax measures this Court has made it clear that "in taxation, even more than in other fields, legislatures possess the greatest freedom and classification." (Citing Cases). Our review of tax classifications has generally been concomitantly narrow, therefore, to fit the broad discretion vested in the state legislatures. When a tax measure is challenged as an undue burden on an activity granted special Constitutional recognition, however the appropriate degree of inquiry is that necessary to protect competing Constitutional value from erosion. See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, supra, 410 U.S. at 359.
>
> This consideration applies equally to the protection of individual liberties, see *Grosjean* v. *American Press Company*, 297 U.S. 233 (1936), *and to the maintenance of our Constitutional Federalism.* See *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 347 U.S. 157, 164 (1954). (Emphasis added).

The Court further said:

> Since non-residents are not represented in the taxing state's legislative halls, cf., *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 532-533 (1959) (BRENNAN, J. CONCURRING), Judicial acquiescence and taxation schemes that burden them particularly could remit them to such redress as they could secure through their own states; but "*to prevent (retaliation)* was one of the chief ends sought to be accomplished by the adoption of the Constitution." *Travis* v. *Yale & Tone Mfg. Co.*, 252 U.S. 60, 80 (1920). Our prior cases, therefore, *reflect an appropriately heightened concern for the integrity of the standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions.* (Emphasis added).

The hunting license fee structure involved here is of course not technically a tax, however, the rationale of the *Austin* case is nevertheless applicable. Here, as with the *Austin* case, important questions relating to our system of Constitutional Federalism are involved. Clearly, the purpose of the Privileges and Immunities Clause and Equal Protection Clause of the Fourteenth Amendment is to avoid discrimination by states against non-residents of such state.

The statutory license fee and regulatory requirements regarding the Mexican Desert Bighorn Sheep is the prime example of the invidious discrimination practiced by the State of New Mexico against non-resident hunters. The non-residents' hunting license fee for such game species is $300.50 whereas the resident license fee is $20.50. The game habitat of this species is completely within and on

Federal land. In 1974 the Department made available five resident licenses and one non-resident license for this particular game species. This "unequal allocation process" was held unconstitutional by the lower Court; but, the Court upheld the Constitutionality of the higher license fee charge made upon non-residents.

Although numerous claims were made by Appellees in support of the license fee discrimination, the only claim upon which the Appellees could provide *any* measure of support was that the fee differential represented an attempt to obtain a "partial cost equalization". For instance, it was held in *Toomer* v. *Witsell,* 334 U.S. 385 (1948) that the state is not without power to restrict the type and size of equipment used by non-residents (in *Toomer,* fishing boats) or even to charge non-residents a differential which would merely compensate the state for any added *enforcement burdens* that they may impose or for any *conservation expenditure* from taxes which *only* residents pay. It is clear from the stipulated testimony from interrogatories and depositions that:

(1) Non-resident hunters do not represent some evil to the State of New Mexico which could be the basis of charging them a greater license fee;

(2) That the purpose of the license fee differential is not to preserve the animals in New Mexico;

(3) That the license fee differential is not a conservation measure;

(4) That the non-resident hunters utilize the same type of equipment as the resident hunters;

(5) The Appellees were unable to prove the license fee differential would compensate the State for additional enforcement burdens;

(6) That there are no records or facts which would indicate that it costs the Appellees more for their search and rescue operations for non-residents vs. residents;

(7) That there are no records or facts which would indicate that it costs the Appellees more for law enforcement because of the non-residents;

(8) That it does not cost the State or the Department any additional funds to provide game animals for hunting by non-residents; and

(9) There are no facts, figures or other information which indicates it costs the Department more to do their job because of the non-resident hunter. Appellant, through the discovery procedures, disproved these possible bases for discrimination by ascertaining that Appellees cannot support the above bases. Therefore Appellant has met the burden required of him. *Mullaney* v. *Anderson,* 242 U.S. 415 (1952).

Thus, Appellant having disproved or ruled out the bases set forth in *Toomer,* the Constitutionality of the statutory license fee scheme had to stand or fall upon whether the discriminatory fee represented a "reasonable attempt to achieve partial cost equalization." (Opinion, pages A13-A14). The Statutory District Court correctly gave no consideration to the Snow Mobile Act, supra, and very little, if any, to the fund appropriations received by the Wildlife Conservation Act, supra. Of course, the $45,-000.00 received to implement the Wildlife Conservation Act was matched by $75,000.00 in Pittman-Robertson funds. In the Opinion, however, it goes on to indicate:

> It (the Game and Fish Department) does receive other valuable benefits and services which the State provides to its agencies *without charge.* The Game and Fish Department does benefit from General Fund supported

programs of other State agencies. The benefits received, however, are *indirect and cannot be reduced to a dollar amount.* Included are: some expenditures by the State Park and Recreation Department; predator control activities by the New Mexico Department of Agriculture operating under agreements with the U. S. Fish and Wildlife Service; disease control activities undertaken by the State Livestock Board; and programs of the State Forestry Department which tend to include the habitat of wildlife." (Opinion, page A6). (Emphasis added).

It should be noted at the outset that the foregoing so-called "benefits from the General Fund" are strictly indirect and that these activities would be performed by the various State entities whether hunting and fishing existed or not. The New Mexico State Game Commission and the New Mexico Department of Game and Fish are financially autonomous. These entities are not dependent upon General Funds of the State of New Mexico nor do they receive any funds of any merit from the State of New Mexico. The so-called "benefits" are provided *free of charge* and as a normal and regular part of the activities of the State entities. The Department is not required nor does it pay any of these State entities, directly or indirectly.

As alluded to hereinabove, 71.9 per cent of the land open to free public hunting is located upon Federal or public-domain land. All of the bighorn sheep species including the Mexican Desert Bighorn Sheep, are hunted on Federal or public-domain lands. To a certain extent this situation exists with other game species. Regarding expenditures of the State Park and Recreation Department, these expenditures obviously do not apply to the hunting areas located upon Federal or public-domain lands because

the upkeep and maintenance of such lands is the responsibility of Federal Governmental entities. It should also be noted that the State does not discriminate between residents and non-residents regarding fees and charges for the use of State parks and recreational facilities.

The same situation applies to the Department of State Forestry—the upkeep and maintenance of any game habitat upon Federal or public-domain lands is strictly a Federal function. Additionally, it should be noted that a substantial portion (46 per cent) of the Department of State Forestry operating funds are Federal aid funds. (Fiscal Year 1972-1973).

Regarding the expenditures by the State Livestock Board, it is admitted that the Board deals only with livestock and takes no direct action regarding wildlife. This Board receives 14 per cent of its operating budget funds from General Fund appropriations and 13 per cent of such operating budget from Federal funds. Benefit, if any, is at best tenuous. Likewise, the same situation applies to the predator control activities of the New Mexico Department of Agriculture in that they are conducted solely for the protection of *livestock.*

It is solely on the basis of the foregoing indirect, nebulous and tenuous "benefits to wildlife" that the lower Court bases its decision to uphold the Constitutionality of the discriminatory license fee structure. The Court refused to apply the stricter test of legislative classification and instead, utilized the "rational relation test". Utilizing *Starns* v. *Malkerson,* 326 F.Supp. 234 (D. Minn. 1970), aff'd per curiam 401 U.S. 985 (1971); *Clarke* v. *Redeker,* 259 F.Supp. 117 (1966); and *Sturges* v. *Washington,* 368 F.Supp. 38 (1973), and its finding that "we feel the State has made a sufficient showing that the non-residents receive the benefits of State General Fund expenditures

which justify the fee differential" (Opinion, page A13), the Court ruled that the discriminatory fee structure represented a reasonable attempt to achieve partial equalization. The lower Court refused to recognize or consider the fact that over seventy per cent of the game habitat of the State of New Mexico is Federal or public-domain lands which are provided and maintained by Federal Governmental entities. In fact, even some of the State entities which allegedly provide the indirect and tenuous benefits to wildlife referred to above receive substantial Federal financing. Lastly, the non-resident hunters and fishermen clearly provide substantial financial benefits to the State of New Mexico, over and above license fees, merely by their presence in the State.

In *Clarke* v. *Redeker,* supra, the Court held:

> The Defendants justify the discrimination primarily on the basis that *resident students or their parents pay taxes to the State of Iowa which in turn, supports and maintains SUI.* The higher tuition charged non-resident students tends to distribute more evenly the cost of operating SUI between residents and non-residents attending the university. (Footnote omitted). Although there is no way for this Court to determine the degree to which the higher tuition charge equalizes the educational costs of the residents and non-residents, it appears to be a reasonable attempt to achieve a partial cost equalization. (At page 123). (Emphasis added).

In *Starns* v. *Malkerson,* supra, the Court held:

> The primary justification the Defendants assert is that the one-year waiting period to acquire resident status for tuition purposes is a *rational attempt by the State to achieve partial cost equalization between those who have and those who have not recently contributed to the State's economy through employment tax payments and expenditures therein.* (At page 240). (Emphasis added).

In *Sturges* v. *Washington,* supra, the Court held:

> The record before us is devoid of evidence, or even a suggestion, that this tuition residency requirement was intended for any reason other than to cover the bare costs of providing for the students' cost of education. In fact, *the only evidence before this Court which relates to the actual costs of higher education in the State of Washington shows that the fees for non-resident students are directly related to the cost of educating that student.* (At page 40).

* * *

> The evidence before this Court shows that *the purpose of the differentiation is to afford residents of this State who have resided here for more than one year immediately preceding the commencement of the school term an opportunity to attend the University at a cost subsidized by taxpayers of the State,* while charging those who have not theretofore contributed tax dollars to the State the actual cost to the State of their education. The one-year waiting period thus serves to provide the State with a time period during which it may charge a realistic tuition rate in order to achieve a partial cost equalization. (At page 41). (Emphasis added).

The foregoing cases and other non-resident tuition cases have a number of factors in common: First, the colleges and universities involved are supported, for the most part, by state general fund appropriations; second, the tuition fees charged students do not defer the cost of

operating the university, particularly the resident tuition fees; third, the purpose of charging the non-resident student a greater tuition fee is an attempt to obtain a "partial cost equalization" because the non-resident student (or his parents) do not contribute tax dollars to the state; and fourth, there is clear evidence of substantial financial support through general fund appropriations from the state. The Department of Game and Fish and State Game Commission are not dependent upon general fund appropriations nor do they receive any *direct* general fund appropriations which can be related to their game animal and fish operations. It is contended that these entities receive indirect benefit from general fund appropriations; but, they are charged nothing for these alleged benefits nor are they required to reimburse the State for these alleged benefits. The cases cited in the lower Court's Opinion make no reference to Federal fund assistance received by the colleges or universities; whereas, a substantial portion of the Department's operating funds are derived from the Federal Government. Additionally, the Department utilizes substantial Federal and public-domain lands for its game habitat.

The Appellees' avowed purpose and basis for charging non-residents a greater license fee appears to run contrary to the declaration of policy contained in §53-1-1 (N.M.S.A. 1953 Comp., as amended), which reads as follows:

> It is the purpose of this Act and the policy of the State of New Mexico to provide an adequate and flexible system for the protection of the game and fish of New Mexico and for the use and development for public recreation and food supply, and to provide for their propagation, planting, protection, regulation and conservation to the extent necessary to provide and maintain an adequate supply of game and fish within the State of New Mexico.

However, assuming the true basis of the unequal license fee structure is an "attempt to achieve a partial cost equalization", which Appellant disputes, Appellant contends that this has already been accomplished by the annual infusion of Federal funds, the amount of which must be increased by purchase of New Mexico hunting and fishing licenses by non-residents. In fact, it is foreseeable that should resident and non-resident hunters and fishermen be charged the same license fee, the number of licenses issued by the State would be increased and thereby enhancing the ability to obtain Pittman-Robertson and Dingell-Johnson Federal funds. It has been admitted that the cost of a non-resident license fee tends to deter non-residents from coming into the State of New Mexico and taking part in hunting and fishing activities.

It is contended that the unequal license fee structure is an arbitrary imposition, which is based solely upon the residency, and there is no indication of any legitimate game and fish management purposes involved. The lower Court's Opinion has effectively provided this State with "carte blanche" power to charge non-resident hunters (and fishermen for that matter) any amount they desire. Questions presented here are substantial both because they bear upon the issue of comity between the states and the effect of the interrelationship between State and Federal funds.

The power of the States to implement and enforce regulatory game and fish laws has its basis in two theories. The first theory, generally known as the "ownership theory", states that a state owns the wild animals within its borders in trust for residents of the state. The earlier cases of *Corfield* v. *Coryell*, 4 Wash. CC 371, F. Cas. No. 3230 (1823); *McCready* v. *Virginia*, 94 U.S. 391 (1876); and *Geer* v. *State*, 161 U.S. 793 (1895) represent the early

cases espousing this theory. However, in *Toomer* v. *Witsell*, 334 U.S. 385 (1948) the Court stated:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive and legal shorthand of the importance to its people that a state have *power* to preserve and regulate the exploitation of an important resource.

As alluded to in the Court's Opinion, it is now difficult to distinguish between the ownership theory, as a basis for the power to regulate wild game, and the police power of the state. In any event, whatever the basis of this power, it is clear that it must be exercised within the bounds of the Federal Constitution. *Schakel* v. *State*, 513 P.2d 412 (1973); *State* v. *Heffernan*, 67 P.2d 240, 41 N.M. 219 (1936); *LeClair* v. *Swift*, 76 F.Supp. 729 (1948); *State* v. *Jack*, 539 P.2d 726 (1975). The state having such power, it is still however clear that the mere fact that the legislation is for the avowed purpose of conservation and preservation does not give Constitutional viability to a law which violates the Constitution. *Brown* v. *Anderson*, 202 F.Supp. 96 (D. Alaska, 1962) and *Russo* v. *Reed*, 93 F.Supp. 554 (1950).

Toomer v. *Witsell* is the controlling case here. In that case, non-resident commercial fishermen were attacking a South Carolina licensing law as unconstitutional. This law imposed a license fee of $25.00 for each shrimp boat owned by a resident and $2,500.00 for each shrimp boat owned by a non-resident. The Court indicated "it does not follow from the existence of power to regulate, however, that such power need be exercised within the confines of generally applicable Constitutional limitations.'" The Court in discussing Article IV, §2 of the Constitution stated:

> The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to ensure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.

It is uncontroverted that the New Mexico license fee structure discriminates against non-residents. The issue is whether such discrimination is prohibited by the Constitution. Appellant contends that it is prohibited by Article IV, §2 of the Constitution which provides in part as follows: "The citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States"; likewise, Appellant contends that discrimination violates §1 of the Fourteenth Amendment to the Constitution which provides in part as follows: "No State shall make or enforce any Law which shall abridge the privileges or immunities of the citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the Laws."

The foregoing are not absolute; however, they do "bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of the other States." *Toomer* v. *Whitsell*, supra. In *Toomer*, the Court indicated that classifications based upon non-citizenship would be outlawed unless there was something to indicate the non-citizen constituted a peculiar source of evil at which the statute is aimed. The Court further stated that a State is not without power to restrict the type and size of equipment used by non-residents, to charge non-residents a differential which would compensate the State for added

enforcement burdens, or for conservation expenditures from taxes which only residents pay. All of the foregoing have been effectively disproved by the Appellant.

In two recent State Court cases, the Privileges and Immunities Clause and the Equal Protection Clause have been applied to situations analogous to this case. In *Schakel* v. *State,* supra, Plaintiff attacked a Wyoming Statute requiring non-residents to hunt with a licensed guide. The State contended that Plaintiff had no Constitutional right which had been infringed upon or denied in that the State being the owner of the wildlife is free to attach any conditions it desires to hunting and that a hunting license is a mere boot or privilege. The Court, citing *Toomer* v. *Witsell,* stated that a State cannot discriminate against citizens of other states merely because of their different citizenship. The State found that there was no reasonable basis for the discrimination and held the Statute unconstitutional. The Court further stated:

> This Statute has been recognized as *discriminatory in a most sensitive area, being confined in its operation to territory owned and administered by the Federal Government.* This has not escaped the notice of the Public Land Review Commission, which recommended the revision of such discriminatory differences between residents and non-residents and styled them as unjustified in noticing this Statute. (Footnote omitted). Because this Statute created a discriminatory classification and because the record in this case demonstrates that it did not reasonably tend to accomplish or have any substantial connection with any of the purposes stated by the State and is not reasonable and appropriate for the accomplishment of these ends, this Statute was therefore void. (Emphasis added).

In *State* v. *Jack,* supra, the Montana Supreme Court held unconstitutional Montana's guide law which required a non-resident to hire a licensed outfitter or guide. The State set forth for basis of the Statute:

(1) It promoted safety for non-resident hunters;

(2) The State regulations are more likely to be obeyed and respected;

(3) Landowners could better protect improper use of their lands; and

(4) The law afforded the State officials would better enforcement control.

The Court held, "The relationship between the statutory classification and its legitimate objectives is tenuous and remote, and therefore insufficient to justify the inequities it has engendered."

In both *Schakel* and *Jack,* the Court utilized the standard "rational relation test" and recognized that statutes and regulations relating to recreational hunting must conform to requirements of the United States Constitution. The bases of discrimination set forth by the Appellees and accepted by the lower Court represent an even more tenuous and remote connection than those set forth in *State* v. *Jack,* supra. Any attempt to distinguish this case on the basis that it represents the sport hunting rather than commercial callings is invalid.

For the foregoing reasons, Appellant respectfully submits that the lower Court erred in its holding that the New Mexico fee structure does not violate the Constitution. The questions presented are substantial and Appellant respectfully requests the Court to review this case.

THIS CASE IS NOT MOOT

The case was filed in 1974 therefore, to a certain extent, was based upon the Statutes, regulations, policies, and customs in force and effect. As the lower Court did not issue its Opinion until almost two years after oral argument, it may be argued that the case is now moot. However, the license fee scheme attacked by Appellant exists to date; in fact, recently the New Mexico State Legislature amended §53-3-6 and again greatly increased the price of most of the non-resident licenses, while increasing resident licenses to a much lesser extent. The lower Court's opinion allows continued increases of non-resident license fees.

The present case represents a question that is "capable of repetition, yet evading review." *Southern Pacific Terminal Company* v. *I.C.C.*, 219 U.S. 498, 515 (1911); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973).

CONCLUSION

For the foregoing reasons it is submitted that the present case represents issues substantial enough to merit a full review of the Court.

Dated this 20th day of January, 1978.

DANIEL E. DUNCAN
3636 Menaul Boulevard, N. E. # 102
Albuquerque, New Mexico 87110
Telephone: (505) 265-7979
Attorney for Appellant

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-387-M Civil

DAVID B. TERK,
Plaintiff,
vs.
LADD S. GORDON, individually and as Director of the Department of Game and Fish, State of New Mexico; FLOYD TODD, ALBERT J. BLACK, ROBERT H. FORREST, HOUSTON McKENZIE, and EDDIE MUNOZ, individually and as members of the State Game Commission, State of New Mexico,
Defendants.

MEMORANDUM OPINION

(Filed August 25, 1977)

This is an action for declaratory and injunctive relief pursuant to 28 U.S.C. 2201 and 2202. Jurisdiction is present pursuant to 28 U.S.C. 1343(3) and 42 U.S.C. 1981 and 1983. Reliance on § 1981 is misplaced. The action is one required to be determined by a three-judge District Court, 28 U.S.C. 2281. Plaintiff alleges that the defendants acting under color of state law are depriving him of rights and privileges secured to him by the United States Con-

stitution through the Privileges and Immunities Clause, §2 of Article IV, and the Fourteenth Amendment.

The plaintiff is a resident of Texas. The defendants are members of the New Mexico Game Commission and serve on the Commission by appointment of the Governor. Ladd Gordon was at material times the Secretary to the Game Commission and Director of the Department of Game and Fish. The defendants acted and are acting under color of state law. N.M.S.A. 53-1-1 et seq. The subject matter of this action concerns the treatment of non-residents who apply for hunting licenses in New Mexico.

The license fee structure as set by statute, N.M.S.A. 53-3-6 (1953 Comp., as amended) is as follows:

License	Residents	Non-residents (1970-74)	Non-residents (Current)
Big Game (Deer, Bear, Turkey, Squirrel)	$ 8.00	$ 50.25	$ 50.75
Cougar	10.50	100.50	300.50
Antelope	10.50	40.00	50.50
Barbary Sheep	20.50	100.00	300.50
Bighorn Sheep (both species)	20.50	100.00	300.50
Oryx	100.50	200.50	300.50
Ibex	50.50	200.50	300.50
Elk	15.50	50.50	75.50

The only discrimination practiced upon a non-resident desiring to hunt animals other than Bighorn Sheep, Oryx and Ibex is in charging the different fee. All non-resident applications for big game and cougar licenses are accepted

and licenses are issued. Licenses to hunt antelope, elk and barbary sheep on public lands are available in numbers limited by the number of animals available for harvest. Applications for these licenses outnumber the number available for harvest. Licenses are issued to those individuals whose applications are selected by random drawing. Non-residents and residents are selected from this same "pool" and have an equal chance of being selected. Landowner licenses, those issued to hunt on private land, are governed by different rules, but that difference is not germane to this lawsuit.

Hunting for Rocky Mountain and Desert Bighorn sheep, Oryx and Ibex is more limited because of insufficient numbers of animals which can be harvested.

The Desert Bighorn is now found only in the Big Hatchet Mountains and the San Andres-Organ range. Estimated population, based on a 1967 survey, totaled less than 200. The Desert Bighorn has been available for hunting only in token numbers. The animal was not hunted between 1955-1967, and from 1970-1975 the hunt has been limited to five resident licenses. Starting in 1972, one non-resident license has been made available per year because the Game Commission considered the Desert Bighorn head so highly prized as a trophy that non-residents should have an opportunity to hunt the species. The Desert Bighorn is hunted only in the W-3 area which is federal land.

The Rocky Mountain Bighorn is hunted in areas W-1 and W-2, which consists of national forest and other BLM lands. This animal is closely related to the Desert Bighorn but has been available for hunting in larger numbers. Generally about fifteen licenses are available per year.

Non-resident applicants for Bighorn licenses, in addition to paying a higher fee, must confront another hurdle before a license can be issued. Applications must be pooled for a random drawing, but non-residents' applications are pooled and drawn separately from resident applications to fill the allocation of licenses set by the Commission in the proclamation. For example, in 1974 the Commission made the following allocation:

Area W-1—Up to 10 resident; up to 2 non-resident
Area W-2—Up to 5 resident; 0 non-resident
Area W-3—Up to 5 resident; up to 1 non-resident

The licenses allocated were drawn from the following pools:

Area	Licenses Resident Applications	Licenses Non-Resident Applications
W-1 & W-2	13 from 268	2 from 6
W-3	5 from 269	1 from 69

A hunter may submit only one application for Bighorn sheep and he must not have previously held a license for the species presently sought. Oryx and Ibex licenses are also subject to allocation between residents and non-residents. During the 1974-75 season, there were five resident and no non-resident Oryx licenses. There were three resident and one non-resident Ibex licenses. A Game and Fish Department Officer must accompany the licensees on these hunts and has the power to select the Oryx to be taken by the hunter.

It is admitted that the purpose of the Game Commission's allocation policy is to favor state residents and limit

the number of non-resident hunters and to preserve game for state residents. While the Commission feels that a fee differential is proper, it did not advocate the 1973 increase in the license fees. The change came from the Legislature without substantial impetus from the Commission.

These are the basic facts behind this controversy. The following facts were presented by the parties to lend support to their respective theories of the case.

Plaintiff has attempted to show that the animals are migratory. The evidence is that some of the animals range within habitats which cross state lines, but they do not migrate in the normal sense of the word.

The State of New Mexico covers an area of 78 Million acres. Thirty-two million acres are open to free public hunting. There are nine million acres of state lands, nine million acres of national forests and fourteen million acres of public-domain land administered by the Bureau of Land Management within the Department of Interior.

The Department of Game and Fish defends its policies and license fee differentials on the grounds that the burden of expenditures made by the state which benefit wildlife falls on New Mexico residents and the non-resident fees are levied in an attempt to equalize the burden.

The Game and Fish Department receives little support from the general fund appropriations. While the Legislature does appropriate funds for annual operations, the monies come from the Game Protection Fund, N.M.S.A. 53-1-8 (1953 Comp., 1975 pp), not the general fund. The source of Game Protection Fund monies is revenue received from the sale of licenses and permits. These funds are generally sufficient to sustain the operations of the Department. Diversion of license fee revenue from the Game Protection Fund disqualifies a state from receiving

federal assistance. The Department received a $45,000 appropriation this fiscal year from the state general fund to implement the Wildlife Conservation Act. N.M.S.A. 53-2-50 (1953 Comp.).

Twenty-five thousand dollars of this appropriation is expended in a manner which will allow the state to qualify for federal assistance under the Pittman-Robertson Act, 16 U.S.C. 669-669j, on a one to three ratio. The source of Pittman-Robertson funds is a federal excise tax on hunting equipment. These funds are allocated back to the states on a formula which considers the size of the state and the number of license issued. The Game and Fish Department receives no other direct aid from the state general fund. It does receive other valuable benefits and services which the state provides to its agencies without charge. The Game and Fish Department does benefit from general fund supported programs of other state agencies. The benefits received, however, are indirect and cannot be reduced to a dollar amount. Included are: some expenditures by the State Park and Recreation Department; predator control activities by the New Mexico Department of Agriculture operating under agreements with the U. S. Fish and Wildlife Service; disease control activities undertaken by the State Livestock Board; and programs of the State Forestry Department which tend to improve the habitat of wildlife.

Defendants contend other departments also benefit wildlife, but the benefits are so indirect or remote that further elaboration would serve no useful purpose.

There is no evidence that non-resident hunters create any special enforcement problem or otherwise tax the resources of the Game and Fish Department more than resident hunters do.

Mr. Terk applied for license for big game and for Desert Bighorn sheep in area W-3. He tendered with each application the resident application fee. When his applications were rejected, he brought this action. He later paid the non-resident fee for Desert Bighorn, but his application was not drawn and he did not receive a license.

The plaintiff first contends that a license fee differential in the amounts specified in N.M.S.A. 53-3-6 (1953 Comp.) based solely on residency violates the Privileges and Immunities Clause of the Constitution. His second contention is that allocating available licenses for Bighorn, Oryx and Ibex between residents and non-residents solely on the basis of residency violates the Privileges and Immunities Clause of the Constitution.

The plaintiff argues that state regulation of animals interferes with his rights as an American citizen to enjoy public lands. We find no provision of federal law supporting this argument, but we do find a few which refute it. Section 1133(d)(8) of Title 16 states that nothing in the Wilderness Preservation Act should be construed as affecting the jurisdiction and responsibilities of the several states with respect to wildlife in national forests. The same policy applies to other public lands. The Department of Interior recognizes state authority to control and regulate hunting of wildlife on public land while authority to control the habitat is vested in the United States. 43 C.F.R. Part 24-1.

We have previously held that wild horses and burros do not become "property" of the United States simply by being physically present on United States land. *State of New Mexico* v. *Rogers C.B. Morton*, 406 F.Supp. 1237 (DC NM 1975) reversed on other grounds. *Sub Nom Kleppe* v. *New Mexico*, 426 U.S. 529 (1975). Whatever

control the federal government may assert over wild animals finds its source in the constitutional powers of the federal government to control and protect the public land, not on a theory of ownership of the animals. *State of New Mexico* v. *Rogers C.B. Morton,* supra; *New Mexico State Game Commission* v. *Udall,* 410 F.2d 1197 (10th Cir. 1969). We are unable to accept the proposition that plaintiff's enjoyment of national forests and wilderness areas is restricted because the state restricts the killing of its wildlife. cf. *Schakel* v. *State,* 513 P.2d 412 (Wyo. 1973).

We see nothing significant in the fact that the state receives substantial federal Wildlife Restoration funds pursuant to the Pittman-Robertson Act to carry out the New Mexico Wildlife Conservation Act, N.M.S.A. 53-2-50 through 53-2-59 (1953 Comp.). The fact that the source of federal revenues is a federal excise tax on some hunting equipment does not by itself operate to give citizens of other states a claim to the common property of New Mexico citizens held in trust by the state. There is nothing in the Act, legislative history or administrative regulations to show that Congress intended the result plaintiff is seeking as a condition of receiving federal assistance and we cannot infer such a purpose from the general purpose of the legislation; to preserve wildlife for the enjoyment of the people. 43 C.F.R. Part 17; 50 C.F.R. Part 80, 1970 U. S. Code Congressional and Administrative News 4353.

With these issues removed from the case, the remainder of the action closely resembles older cases based on the Privileges and Immunities Clause, Art. IV, §2 Cl.1.

In the recent case of *Austin* v. *New Hampshire,* 420 U.S. 656 (1975), the Supreme Court in striking down a tax on non-resident income had an opportunity to re-

examine the historical basis for the Privileges and Immunities Clause. The Clause establishes a norm of comity without specifying the particular subjects as to which citizens of one state coming into the jurisdiction of another state are guaranteed equality of treatment. The purpose of the Clause is to fashion a single nation. The fundamental privileges and immunities protected by the Clause are those which tend to achieve this purpose. They are fundamental privileges which attach to the fact of citizenship.

The early cases flatly do not recognize the privilege of recreational hunting to be within the protection of the Clause. In *McCready* v. *Virginia,* 94 U.S. 391 (1876), criminal conviction was upheld of a non-resident defendant who planted oysters in a Virginia river bed. The court reasoned that states had the power to control cultivation of oysters in the tide beds through its power to regulate the common property of the people of Virginia. The right to use common property of the state was a property right, not a mere privilege and immunity of citizenship. The court held that the Constitution did not give citizens of one state an interest in the common property of citizens of another state.

In *Geer* v. *Connecticut,* 161 U.S. 519 (1896), the court upheld a statute forbidding removing game from the state even though it was lawfully taken. The court recognized that game animals within a state belong to the people and the state "owns" the game, not as a proprietor, but in its sovereign capacity as representative of its people in common. To hunt and kill game is a privilege, not a right inherent in an individual, and there is no requirement that the state allow citizens of other states to participate in that which they do not own.

The first serious inroads on the power of the state came in the 1948 case of *Toomer* v. *Witsell*, 334 U.S. 385 (1948). Georgia residents challenged South Carolina statutes governing commercial shrimping in the three-mile maritime belt. The shrimp migrated from North Carolina to Florida and returned annually. The most advantageous operation of the commercial shrimping fleet would be to follow the shrimp down the coast, but state restrictions on non-resident fishermen enacted partially in retaliation against other states had divided the fishery at state lines. The main component of the South Carolina restriction was a $2,500 license fee for non-resident boats, which the Court said was exclusionary. One of the privileges protected by Article IV, §2 Cl.1, is that a citizen of State A may do business in State B where there is no substantial reason for discrimination. The court said that the ownership theory was a legal fiction, expressive of the importance that a state have power to preserve and regulate the exploitation of an important resource. The court characterized commercial shrimping as a common calling or business and therefore within the protection of the Privileges and Immunities Clause. See also *Mullaney* v. *Anderson*, 342 U.S. 415 (1952).

McCready was distinguished because it did not involve free-swimming, migratory fish and covered only inland waters.

McCready, treated in *Toomer*, supra, at 400, as a *commercial* fishing case, was viewed as a narrow exception to the Privileges and Immunities Clause. The continuing validity of *Geer* was not discussed in *Toomer* and we have recently found *Geer* still valid authority on the ownership doctrine, at least to the extent necessary to negate ownership by the United States. *State of New Mexico* v. *Rogers C. B. Morton*, supra.

Similar cases followed *Toomer* in the lower courts. *Russo* v. *Reed*, 93 F.Supp. 554 (D.C.Me. 1950) and *Edwards* v. *Leaver*, 102 F.Supp. 698 (D.C.R.I. 1952). In *Russo* the court indicated that sport hunting was not at issue either in the case before it or in *Toomer*.

In 1971, Maine followed *McCready* in upholding the validity of a town ordinance which discriminated against non-residents of the town taking shellfish in tidal flats, *State* v. *Alley*, 274 A.2d 718 (1971), on the property theory and that the discrimination was justified by municipal involvement in conservation. And, in *American Commuters Assoc.* v. *Levitt*, 279 F.Supp. 40 (1967) Aff'd 405 F.2d 1148 (1969), non-residents, although paying income tax on New York derived income, were held not entitled to claim a right to obtain a fishing license for non-commercial purposes for the same fee as that charged to residents, and the court concluded that no substantial constitutional question had been raised. In addition, no showing had been made that the difference in fee was not justified by programs supported by state taxes. The court cited *Toomer* and then curiously distinguished *Toomer* on the grounds that it involved commercial fishing and commerce.

Our research and the briefs disclose cases similar to these, but we find only one case arguable applying *Toomer* to recreational hunting, *Schakel* v. *State*, 513 P.2d 412 (1973), striking down a statute requiring non-residents to have a guide.

Since Justice Holmes in *Missouri* v. *Holland*, 252 U.S. 416, 434 (1919), said, "To put the claim of the State upon title is to lean upon a slender reed," and Justice Vinson in *Toomer* said:

> "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have

> power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States."

Courts have been unwilling to end discussion of the different treatments accorded to non-residents even after concluding that the alleged rights and privileges were not within the protection of the Article IV, §2 Cl.1, but have been strongly inclined to further subject the provisions to the analysis accorded to legislative classifications created in the exercise of the State's police power. Indeed, these two provisions overlap to some extent.

If a provision is able to withstand constitutional attack on a police power approach, the *McCready* theory of ownership and the *Geer* theory of trusteeship, whatever limitations *Toomer* may place on the trustee theory, become academic. If, however, the provision does not withstand police power analysis, a court must decide whether the ownership theory is still alive when applied to recreational hunting or whether modern concepts of the police power have displaced or limited the absolute power formerly conceded to the state under the ownership or trusteeship doctrines. This appears to us to be the most practical way to approach the problem.

It is recognized in this circuit that a state has wide discretion in exercising the police power. *Lamm* v. *Volpe*, 449 F.2d 1202 (10th Cir. 1971). Protection of wildlife is within the police power and the state has great latitude in determining what means are appropriate for its protection. *Lacoste* v. *Department of Conservation*, 263 U.S. 545, 552 (1924).

The test to determine the legitimacy of a legislative classification is essentially the same for police power as the equal protection test: whether the classification is reasonable and whether it is rationally related to a legitimate state object. *State* v. *Kemp*, 44 NW2d 214 (S.D. 1950); *Schakel* v. *State*, supra; *Perez Gonzales* v. *Irizarry*, 387 F.Supp. 942 (1974); *Clarke* v. *Redeker*, 259 F.Supp. 117 (1966).

This test applies so long as the classification is not based on a suspect criteria or does not affect a fundamental right. Residency is not a suspect criterion, and the scheme does not penalize recent interstate movement. The travel argument was rejected in *American Commuters* v. *Levitt* and *Toomer* type restrictions were indicated to be distinguishable from durational residency requirements in *Dunn* v. *Blumstein*, 405 U.S. 330, 340-342 notes 9-13 (1972).

Sport hunting is not a fundamental right or privilege of national citizenship. There are, therefore, no impediments to applying the rational relationship test. We find the disparity in fees charged non-residents to be reasonable and within the police power of the state. With the exception of three licenses; Cougar, Barbary Sheep and Bighorn Sheep, the non-resident fee ranges from three to six times the resident fee. We feel the State has made a sufficient showing that non-residents receive the benefits of state general fund expenditures which justify the fee differential.

Our review of non-resident tuition cases indicates that the state has wide latitude in setting tuition rates. *Starns* v. *Malkerson*, 326 F.Supp. 234 (D.Minn. 1970) Aff'd per Curiam 401 U.S. 985 (1971); *Clarke* v. *Redeker*, supra; *Sturges* v. *Washington*, 368 F.Supp. 38 (1973). The difference need only be a reasonable attempt to achieve partial

cost equalization. Mathematical precision is not required. *Williams* v. *Dandridge*, 397 U.S. 471 (1970). In *Starns* the court recognized the right of the state to require new residents to make some tangible or intangible contribution to the state or its economy before receiving the benefit of the lower tuition fee.

While three of the fee differentials are quite substantial, we feel that the high statutory price of a non-resident license to hunt rare and exotic species for sport which can sustain only very limited hunting is a question of legislative wisdom, not legislative power.

We cannot say that the additional differential is arbitrary when the rareness of the animals is considered. It is not arbitrary to say that non-residents desiring to hunt rare species in New Mexico should make a greater contribution to the Game Protection Fund. We are aware of the fact that with respect to these three rare species we are unable to completely separate a police power analysis from an ownership analysis.

We conclude, therefore, that the present fee structure in N.M.S.A. 53-3-5 (1953 Comp.) is not offensive to the Constitution.

Plaintiff's second contention is that allocation of licenses for Bighorn, Oryx, and Ibex on the basis of residency discriminates impermissibly against non-residents.

It is admitted that the purpose of the allocation policy of the Game Commission is to preserve hunting of the three species for New Mexico citizens. We find no conservation considerations involved and non-residents are not a source of evil. From the Bighorns' point of view, the residency of the hunter is not relevant.

The effect of the allocation is to exclude non-residents who have already tendered the non-resident fee solely because they are non-residents. This is outside the limits of the police power.

If it can be done at all, the power to preserve game for one's own citizens must be based on the ownership or trusteeship theory. The issue is whether the power of the state under the ownership or trusteeship doctrines of the earlier cases is absolute or whether it is limited in the same manner as the police power. We have observed a general reluctance to rely solely on the ownership or trusteeship theories, but we find no cases directly overruling the theories. The Supreme Court in *Kleppe*, supra, at 545, now characterizes the States' power over wild animals in the conjunctive as "trustee and police powers." The better view is that the Commission's authority to regulate game held in trust by the state is exercised under police power. We believe that New Mexico Courts have so held. *State* v. *Heffernan*, 41 N.M. 219, 227-228 (1937). See also *Arkansas State Game and Fish Commission* v. *W. R. Wrapest Co.*, 76 F.Supp. 323 (D.Ark. 1948). We conclude, therefore, that the allocation of licenses between residents and non-residents cannot be upheld.

A judgment will be entered in accordance with this opinion.

/s/ Oliver Seth
United States Circuit Judge

/s/ Howard C. Bratton
United States District Judge

/s/ E. L. Mechem
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-387-M Civil

DAVID B. TERK,
Plaintiff,

vs

LADD S. GORDON, individually and as Director of the Department of Game and Fish, State of New Mexico; FLOYD TODD, ALBERT J. BLACK, ROBERT H. FORREST, HOUSTON McKENZIE, and EDDIE MUNOZ, individually and as members of the State Game Commission, State of New Mexico,
Defendants.

JUDGMENT AND ORDER

(Filed October 28, 1977)

THIS ACTION having come before the Court upon the Complaint of Plaintiff whereby Plaintiff sought the issuance of temporary, preliminary and permanent injunctions enjoining the Defendants, their officers and employees, from enforcing terms of §53-1-1, et seq. N.M.S.A. 1953 Comp. and enforcing or pursuing any regulation, policy, practice, custom or usage by which non-resident hunters are charged a greater fee for New Mexico State hunting licenses and available licenses for certain animal species are unequally allocated between residents and non-residents of the State of New Mexico; this matter being presented to this three Judge District Court through Stipu-

lations, Brief and oral argument; the issues having been duly heard and this Court having rendered its decision heretofore through a Memorandum Opinion:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. The Defendants, their successors, officers, employees and agents be, and hereby are, permanently enjoined from enforcing any statute, regulation, policy, practice, custom or usage which unequally allocates available licenses for the game species of Rocky Mountain and Desert Bighorn Sheep, Oryx and Ibex between residents and non-residents of the State of New Mexico solely on the basis of residency.

2. Plaintiff's prayer that the Defendants, their successors, officers, employees and agents be enjoined from enforcing any statute, regulation, policy, practice, custom or usage whereby non-residents are charged a greater fee than residents of the State of New Mexico be, and hereby is, denied.

3. All other relief requested by Plaintiff be, and hereby is, denied.

/s/ Oliver Seth
United States Circuit Judge

/s/ Howard C. Bratton
United States District Judge

/s/ E. L. Mechem
United States District Judge

Submitted By:

James H. Russell, Jr.
Special Assistant Attorney General
Attorneys for Defendants
P.O. Box 2385
Santa Fe, New Mexico 87501

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 74-387-M Civil

DAVID B. TERK,
Plaintiff,

vs.

LADD S. GORDON, individually and as Game Director of the Department of Game and Fish, State of New Mexico; FLOYD TODD, ALBERT J. BLACK, ROBERT H. FORREST, HOUSTON McKENZIE, and EDDIE MUNOZ, individually and as members of the State Game Commission, State of New Mexico,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed November 25, 1977)

NOTICE IS HEREBY GIVEN that David B. Terk, the Plaintiff in the above captioned and numbered cause, hereby appeals to the Supreme Court of the United States from the Judgment and Order entered in this action on October 28, 1977 and including, that portion of said Judgment and Order which denies Plaintiff's prayer for a permanent injunction enjoining the Defendants, their successors, officers, employees, and agents from enforcing any statute, regulation, policy, practice, or usage whereby non-resident hunters are charged a greater fee than resident

hunters of the State of New Mexico. This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ Daniel E. Duncan
Daniel E. Duncan
Attorney for Plaintiff
3636 Menaul Boulevard N. E.
Suite 102
Albuquerque, New Mexico 87110
Telephone: 265-7979

I hereby certify that a copy of the foregoing was mailed to opposing counsel of record this 23rd day of November, 1977.

/s/ Daniel E. Duncan
Daniel E. Duncan

APPENDIX D

53-3-6. License fees.

A. * * * [Same as Volume 8, part 1, Cumulative 1975 Supplement.]

B. The director shall collect the following fees for each license of the class indicated:

Resident, fishing	$ 7.00
Resident, small game	8.00
Resident, big game	12.00
Resident, general hunting	15.00
Resident, general hunting and fishing	20.00
Resident, antelope	15.00
Resident, elk	20.00
Resident, mountain or barbary sheep	25.00
Resident, cougar	15.00
Resident, bison	100.00
Resident, oryx	25.00
Resident, ibex	25.00
Resident, gazelle	25.00
Resident, javelina	15.00
Resident, fur dealer	5.00
Resident, trapper	5.00
Nonresident, fishing	15.00
Nonresident, small game	25.00
Nonresident, big game	90.00
Nonresident, bear	50.00
Nonresident, cougar	75.00
Nonresident, antelope	100.00
Nonresident, elk	135.00

Nonresident, mountain sheep	300.00
Nonresident, barbary sheep	300.00
Nonresident, bison	200.00
Nonresident, oryx	300.00
Nonresident, ibex	300.00
Nonresident, gazelle	300.00
Nonresident, javelina	50.00
Nonresident, fur dealer	50.00
Nonresident, trapper	300.00
Nonresident, non-game	15.00
Nonresident, deer, bow-hunting	30.00
Resident junior-senior fishing	1.00
Temporary fishing, one day	3.00
Temporary fishing, 5 days	7.50
Special season deer tag	2.00
Resident, special season turkey	5.00
Nonresident, special season turkey	50.00
Trout stamp or validation, class A	4.00
Trout stamp or validation, class B	3.00
Trout stamp or validation, class C	2.00
Trout stamp or validation, class D	5.00
Shipping	1.25
Retention	1.25
Resident Senior General Hunting	10.00

History: 1953 Comp., § 53-3-6, enacted by Laws 1964 (1st S.S.), ch. 17, § 5; 1965, ch. 32, § 1; 1966, ch. 17, § 1; 1967, ch. 2, § 1; 1969, ch. 28, § 3; 1971, ch. 75, § 5; 1973, ch. 268, § 2; 1977, ch. 180, § 3.

The 1977 amendment rewrote subsection B to the extent that a detailed comparison is not practicable. The

major changes, however, were an increase in most of the respective fees, substitution of "small game" for "bird," addition of fees for gazelles, deletion of fees for guides for residents ($10.00) and beaver tags ($1.00), insertion of "or validation" following "trout stamp" licenses, addition of class D trout stamp or validation and addition of "Resident Senior General Hunting" license.

53-3-6. License fees.—A. The director shall keep a record of all money received, and licenses and permits issued by him, numbering each class separately. Upon satisfactory proof that any license or permit has been lost before its expiration, he may issue a duplicate and collect a fee of one dollar ($1.00) for it. The director shall collect a nonrefundable fee of one dollar ($1.00) from each applicant for a special season hunting license or permit.

B. The director shall collect the following fees for each license of the class indicated:

Resident, fishing	$ 5.50
Resident, bird	5.00
Resident, big game	7.50
Resident, general hunting	9.00
Resident, general hunting and fishing	12.00
Resident, antelope	10.00
Resident, elk	15.00
Resident, mountain or barbary sheep	20.00
Resident, cougar	10.00
Resident, bison	100.00
Resident, oryx	100.00
Resident, ibex	50.00
Resident, javelina	10.00
Resident, fur dealer	5.00
Resident, trapper	2.50

Resident, guide	10.00
Nonresident, fishing	10.00
Nonresident, bird	17.00
Nonresident, big game	50.25
Nonresident, bear	40.00
Nonresident, cougar	300.00
Nonresident, antelope	50.00
Nonresident, elk	75.00
Nonresident, mountain sheep	300.00
Nonresident, barbary sheep	300.00
Nonresident, bison	200.00
Nonresident, oryx	300.00
Nonresident, ibex	300.00
Nonresident, javelina	25.00
Nonresident, fur dealer	50.00
Nonresident, trapper	50.00
Nonresident, nongame	10.00
Nonresident, deer, bow hunting	15.00
Beaver tag	1.00
Resident junior-senior fishing	1.00
Temporary fishing, one day	2.00
Temporary fishing, 5 days	5.25
Special season deer tag	2.00
Resident, special season turkey	5.00
Nonresident, special season turkey	50.00
Trout stamp, class A	3.00
Trout stamp, class B	1.00
Trout stamp, class C	1.00
Shipping	1.25
Retention	1.25

History: C. 1953, § 53-3-6 enacted by Laws 1964 (1st S. S.), ch. 17, § 5; Laws 1965, ch. 32, § 1; 1966, ch. 17, § 1; 1967, ch. 2, § 1; 1969, ch. 28, § 3; 1971, ch. 75, § 5; 1973, ch. 268, § 2.

Compiler's Notes.

Laws 1964 (1st S. S.), ch. 17, § 5 repealed old section 53-3-6 (Laws 1912, ch. 85, § 47; Code 1915, § 2470; Laws 1915, ch. 101, § 13; 1919, ch. 133, § 8; 1925, ch. 57, § 2; 1927, ch. 26, § 1; C. S. 1929, § 57-255; Laws 1947, ch. 47, § 1; 1949, ch. 13, § 1; 1941 Comp. § 43-306; Laws 1955, ch. 56, § 1) and enacted a new section 53-3-6.

Amendments.

The 1965 amendment inserted the provision for a one-day fishing license in subsection B and added subsection C.

The 1966 amendment inserted "Nonresident, deer, bow hunting, fifteen dollars" in subsection B.

Supreme Court, U. S.
FILED
MAR 6 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1042

DAVID B. TERK,
Appellant,

vs.

LADD S. GORDON, Individually and As the Director of the Department of Game and Fish, State of New Mexico; FLOYD TODD, ALBERT J. BLACK, ROBERT H. FORREST, HOUSTON McKENZIE, and EDDIE MUNOZ, Individually and As Members of the State Game Commission, State of New Mexico,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO AFFIRM

VALDEZ, RUSSELL & READ
JAMES H. RUSSELL, JR.
Special Assistant Attorney General
State of New Mexico
P. O. Box 2385
Santa Fe, New Mexico 87501
Telephone (505) 988-2802
Attorney for Appellees

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

MOTION 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 2

ARGUMENT 3

CONCLUSION 15

Citations

CASES

Alabama State Federation of Labor v. *McAdory*, 325 U.S. 450 (1945) 13

American Commuters v. *Levitt*, 279 F. Supp. 40 (1967), aff'd, 405 F.2d 1148 (1969) 11

Austin v. *New Hampshire*, 420 U.S. 656 (1975) 6, 7

Blake v. *McClung*, 172 U.S. 239 (1898) 4

Canadian Northern Ry. v. *Eggen*, 252 U.S. 553 (1920) 4

Clarke v. *Redeker*, 259 F. Supp. 117 (1966), cert. den., 396 U.S. 862 (1966) 13

Commonwealth of Massachusetts v. *Westcott*, ... U.S. ....., 97 S. Ct. 1755, 52 L. Ed. 2d ..... (1977) 3

Corfield v. *Coryell*, 4 Wash. CC 371, 6 Fed. Cas. 546 (No. 3230) (E.D. Pa. 1823) 4

Douglas v. *Seacoast Products, Inc.*, 429 U.S. ....., 97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977) 3

Dunn v. *Blumstein*, 405 U.S. 330 (1972) 11

In re Eberle, 98 Fed. 295 (C.C. Ill. 1899) 9-10

Kleppe v. *New Mexico*, 426 U.S. 529 (1976) 8, 11

Lacoste v. *Dept. of Conservation*, 263 U.S. 545 (1924) 11
Montana Outfitters Action Group v. *Fish and Game Commission of Montana*, ... U.S. ....., 97 S. Ct. 1096, ... L. Ed. 2d ..... (1977) 3
New York Rapid Transit Corp. v. *New York*, 303 U.S. 573 (1938) 13
Rast v. *VanDeman & Lewis Co.*, 240 U.S. 342 (1916) 13
San Antonio School District v. *Rodriguez*, 411 U.S. 1 (1973) 4, 12
Shapiro v. *Thompson*, 394 U.S. 642 (1969) 5
Starns v. *Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), aff'd per curiam, 401 U.S. 985 (1971) 13
State v. *Heffernan*, 41 N.M. 219, 67 P.2d 240 (1936) 12
State v. *Kemp*, 73 So. Dak. 458, 44 N.W. 2d 215 (1950), appeal dismissed for want of substantial federal question, 340 U.S. 923 (1951) 10
Sturges v. *Washington*, 368 F. Supp. 38 (1973) 13
Toomer v. *Witsell*, 334 U.S. 385 (1948) 6, 10
United States v. *Wheeler*, 254 U.S. 281 (1920) 4

STATUTES

United States Constitution, Article IV, §2 .....2, 3, 4
United States Constitution, Article IV, §3, Cl. 2 8
United States Constitution, Article VI, Cl. 2 3
United States Constitution, Amendment XIV 2, 3, 11
16 U.S.C. 669, et seq. 8
16 U.S.C. 777, et seq. 8
16 U.S.C. 1133(d)(8) 7
28 U.S.C. 2281 1
N.M.S.A. 1953 Comp. §53-2-50 through §53-2-59 9

MISCELLANEOUS

43 C.F.R. Part 17 9
50 C.F.R. Part 80 9
1970 U.S. Code Congressional and Administrative News 4353 9
Federal Legislative Jurisdiction Report Prepared for the Public Land Law Review Commission, U.S. Department of Justice, 37 Washington, D.C. (May 1969) 8

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1042

DAVID B. TERK,
Appellant,

vs.

LADD S. GORDON, Individually and As the Director of the Department of Game and Fish, State of New Mexico; FLOYD TODD, ALBERT J. BLACK, ROBERT H. FORREST, HOUSTON McKENZIE, and EDDIE MUNOZ, Individually and As Members of the State Game Commission, State of New Mexico,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO AFFIRM

MOTION

Appellees, Ladd S. Gordon, et al., pursuant to Rule 16 of the Supreme Court of the United States, move this Court to affirm the judgment and order entered on October 28, 1977 by the District Court for the District of New Mexico, sitting as a Three-Judge Court pursuant to Title 28 U.S.C. §2281, on the ground that it is manifest that the question on which the decision of the cause depends so unsubstantial as not to need further argument.

QUESTION PRESENTED

Whether the State of New Mexico's statutory scheme governing license fees for recreational hunting, whereby nonresident hunters are charged higher license fees than resident hunters, denies any privileges or rights guaranteed the nonresidents pursuant to the Privileges and Immunities Clause of Article IV, §2 and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

The Statement of the Case contained in Appellant's Jurisdictional Statement, dated January 20, 1978, is hereby adopted and incorporated by reference by Appellees for the purpose of this motion.

ARGUMENT

The Statutory District Court found that the rights asserted by Appellant were recreational in nature and, as such, did not constitute a privilege and immunity protected by Article IV, §2 of the United States Constitution. It further found that, based on the facts before it, residency was a reasonable classification rationally related to a legitimate state object and did not constitute an invidious classification condemned by the Equal Protection Clause of the Fourteenth Amendment (Jurisdictional Statement, Opinion, A13).[1] The license fee scheme set forth in the challenged New Mexico statutes serves the purpose of equalizing the burden of expenditures made by the State of New Mexico for the benefit of its wildlife, which would otherwise be borne solely by its residents (Jurisdictional Statement, Opinion, A13).[2]

---

1. For purposes of this motion, Appellees adopt and incorporate by reference the Appendix to Appellant's Jurisdictional Statement.

2. In his Jurisdictional Statement, Appellant notes that this Court has accepted jurisdiction in *Baldwin, et al.* v. *Fish and Game Commission of the State of Montana,* Supreme Court No. 76-1150 and *Massachusetts* v. *Westcott,* Supreme Court No. 75-1775. The *Baldwin* case is more completely cited as *Montana Outfitters Action Group* v. *Fish and Game Commission of Montana,* ..... U.S. ....., 97 S. Ct. 1096, ... L. Ed. 2d ..... (1977). While that case involves the issue of hunting license fee differentials between nonresidents and residents of the State of Montana, it is distinguishable from the present case. In *Baldwin,* the lower court did not base its decision upon a cost allocation equalization as was done in the present case, and in *Baldwin* the lower court found that the state may prefer its residents over nonresidents or condition the enjoyment of a nonresident "upon such terms as it saw fit." In the case at bar, the lower court subjected the license fee differential to a police power analysis. The *Westcott* case is more completely cited as *Commonwealth of Massachusetts* v. *Westcott,* ..... U.S. ....., 97 S. Ct. 1755, 52 L. Ed. 2d ..... (1977). It, as well as the companion case of *Douglas* v. *Seacoast Products, Inc.,* 429 U.S. ....., 97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977), dealt with *commercial* fishing disputes and preemption of state law by federal law, under the Supremacy Clause, Article VI, Cl. 2 of the Constitution, which are not issues before this Court in the present case.

An analysis of the argument of Appellant conclusively demonstrates the lack of a substantial federal question put forth by this appeal.

Appellant initially contends that the New Mexico hunting license fee scheme violates the privileges and immunities clause of Article IV, §2 of the Constitution. However, Appellant ignores the *nature* of the activity involved. He does not assert that recreational or sport hunting is a fundamental right or privilege and immunity. Rather, appellant takes a "shotgun" approach based on the general concepts of "comity" between the states and our system of "Constitutional Federalism" as they relate to issues other than the nature of the activity, such as the presence of federal land in New Mexico and the existence of federal assistance to the State for wildlife restoration.[3]

The courts in their analysis of the privileges and immunities clause have consistently used a "fundamental right" analysis based on the *nature* of the right asserted since the earliest interpretation of the clause in *Corfield* v. *Coryell*, 4 Wash. CC 371, 6 Fed. Cas. 546 (No. 3230) (E.D. Pa. 1823). E.g. *Canadian Northern Ry.* v. *Eggen*, 252 U.S. 553 (1920); *Blake* v. *McClung*, 172 U.S. 239 (1898). And see *United States* v. *Wheeler*, 254 U.S. 281 (1920). In *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), this Court considered whether education was a fundamental right entitled to protection of the Equal Protection Clause. In finding no fundamental right involved,

3. It should be noted that in the lower court, Appellant, among other things, claimed that the license fee differential impinged upon and deprived him of his right to use and enjoy federal lands in New Mexico. He also claimed that the license fee differential interfered with his right of interstate travel. Issues related to these purported rights are not raised before this Court by Appellant and are, therefore, not before this Court on appeal.

Mr. Justice Powell set forth the nature of the inquiry required as follows:

> Mr. Justice Harlan, dissenting from the Court's application of strict scrutiny to a law impinged upon the right of interstate travel, admonished that "[v]irtually every state statute affects important rights." *Shapiro* v. *Thompson* 394 U.S. at 655, 661. In his view, if the degree of judicial scrutiny of state legislation fluctuacted depending on a majority's view of the importance of the interest affected, we would have gone "far toward making this Court a 'super-legislature'." *Ibid.* We would, indeed, then be *assuming a legislative role and one for which the Court lacks both authority and competence* (Emphasis added). Mr. Justice Harlan's concern correctly articulates the limits of the fundamental rights rationale employed in the Court's equal protection decisions:
>
> "The Court today does *not* (Emphasis in original) pick out particular human activities, characterize them as 'fundamental,' and give them added protection. . ." To the contrary, the Court simply recognizes, as it must, an *established constitutional right* (Emphasis added), and gives to that right no less protection than the Constitution itself demands." *Id.*, at 642.

The Court went on to further state that the inquiry is whether there is a right explicitly or implicitly guaranteed by the Constitution.

Therefore, the initial inquiry must be to the nature of the right claimed and whether it is an established constitutional right. The right asserted by Appellant is recreational in nature. Sport hunting is not a fundamental right or privilege of national citizenship (Jurisdictional State-

ment, Opinion, A9). If something as basic as education is not a constitutionally recognized fundamental right, how can a recreational or leisure time activity be given greater protection?

Appellant relies heavily upon *Toomer* v. *Witsell*, 334 U.S. 385 (1948) and asserts that it governs the present case. That case is plainly distinguishable from the case at bar. It involved the constitutionally recognized privilege of a citizen of one state to do business in another state. Involved was the challenge of a South Carolina Statute charging a higher license fee for a Georgia resident than a South Carolina resident for *commercial* shrimping within the three-mile maritime belt. *Toomer* involved migratory species and the virtual exclusion of nonresidents in the context of constitutionally protected commercial activity. Appellant has not challenged the lower court's finding that the animals here in issue are not migratory (Jurisdictional Statement, Opinion, A5) and it is not alleged by Appellant in this Court that the challenged statutory scheme is totally exclusionary as to nonresidents, nor was any evidence to this effect presented to the lower court. The lower court analyzed *Toomer* and found it did not govern sport hunting (Jurisdictional Statement, Opinion, A10-A11).

Apparently conceding that sport hunting is not a constitutionally recognized privilege and immunity, Appellant has sought to bring his alleged right, whatever it may be classified as, under the broad umbrella of "Constitutional Federalism". In this quest Appellant has relied upon *Austin* v. *New Hampshire*, 420 U.S. 656 (1975). In that case the State of New Hampshire imposed a tax on out-of-state commuters earning income in the state, but through a series of statutory provisions exempted residents from payment of any tax on income earned in the

State. In striking down the commuters' tax, the Court re-examined the historical basis of the Privileges and Immunities Clause. That historical basis does not grant Appellant constitutional recognition of his recreational right. The present case does not involve a tax measure challenged as an undue burden on an activity granted special constitutional recognition. The lower court recognized this in its treatment of the general principles of *Austin* as applied to recreational hunting, and found that Appellant's recreational rights were *not* granted constitutional recognition by *Austin* (Jurisdictional Statement, Opinion, A9).

Appellant makes much of the fact that a large portion of the land in New Mexico, open to free public hunting, is found on federal land administered by the Bureau of Land Management or National Forest Lands administered by the Forest Service. The presence of federally owned land providing significant big game habitat does not transform recreational hunting into a fundamental right protected by the Privileges and Immunities Clause. As a preliminary matter in its opinion, the lower court properly came to this conclusion:

> The plaintiff argues that state regulation of animals interferes with his rights as an American citizen to enjoy public lands. We find no provision of federal law supporting this argument, but we do find a few which refute it. Section 1133(d)(8) of Title 16 states that nothing in the Wilderness Preservation Act should be construed as affecting the jurisdiction and responsibilities of the several states with respect to wildlife in national forests. The same policy applies to other public lands. The Department of Interior recognizes state authority to control and regulate hunting of wildlife on public land while authority to control the habitat is vested in the United States. 43

C.F.R. Part 24-1[4] (Jurisdictional Statement, Opinion, A7).

The issue of State regulation of hunting on federal lands located within its borders relates only to the relationship between the states and the federal government in the context of the Property Clause and the Supremacy Clause. In *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976) this Court upheld, against constitutional challenge by the State of New Mexico, the Wild Free-Roaming Horses and Burros Act which protects feral animals on the public domain. It was held that by virtue of the Property Clause of the Constitution, Article IV, §3, Cl. 2, Congress exercises the powers of both a proprietor and a legislature over the public domain. State hunting license regulations are applicable on public lands and there is no occasion for exercise of the Supremacy Clause because federal sovereignty is not threatened. See *Federal Legislative Jurisdiction, Report Prepared for the Public Land Review Commission, U.S. Department of Justice,* 37 Washington, D.C. (May 1969).

Appellant also makes much of the fact that New Mexico receives substantial federal revenue through the Pittman-Robertson Act, Title 16, U.S.C. §669, et seq.[5] The Pittman-Robertson Act, which imposes a federal excise tax on sport equipment and appropriates the proceeds to the states and territories for wildlife restoration, similarly does not convert recreational hunting into a fundamental right protected by the Privileges and Immunities

4. See Footnote 3.

5. Appellant also refers to the Dingell-Johnson Act, Title 16, U.S.C. §777, et seq. This statute is not properly before this Court. It deals with the appropriation of federal monies to the various states and territories for *fish* restoration and management projects. Appellant did not take issue in the lower court with the New Mexico Statutes governing fishing licenses.

Clause. The lower court also properly disposed of this issue:

> We see nothing significant in the fact that the state receives substantial federal Wildlife Restoration funds pursuant to the Pittman-Robertson Act to carry out the New Mexico Wildlife Conservation Act, N.M.S.A. 53-2-50 through 53-2-59 (1953 Comp.). The fact that the source of federal revenues is a federal excise tax on some hunting equipment does not by itself operate to give citizens of other states a claim to the common property of New Mexico citizens held in trust by the state. There is nothing in the Act, legislative history of administrative regulations to show that Congress intended the result Plaintiff is seeking as a condition of receiving federal assistance and we cannot infer such a purpose from the general purpose of the legislation; to preserve wildlife for the enjoyment of the people. 43 C.F.R. Part 17; 50 C.F.R. Part 80; 1970 U.S. Code Congressional and Administrative News 4353 (Jurisdictional Statement, Opinion, A8).

Finally, as near as Appellees can determine from a reading of Appellant's Jurisdictional Statement, Appellant claims that comity among the states is threatened by the hunting license fee differentials between residents and nonresidents.

This practice of hunting license fee differentials between residents and nonresidents has long been sanctioned by the courts and has not been cause of friction between the states necessitating federal intervention.[6] E.g., *In re*

6. In the Court below the New Mexico hunting license fee differential was supported by amicus curiae, International Association of Game, Fish and Conservation Commissioners, which is

(Continued on following page)

Eberle, 98 Fed. 295 (C.C. Ill. 1899), and *State* v. *Kemp*, 73 So. Dak. 458, 44 N.W. 2d 215 (1950), appeal dismissed for want of substantial federal question, 340 U.S. 923 (1951).

Having disposed of Appellant's various theories seeking to find an applicable constitutionally recognized right, the lower court proceeded to subject the questioned New Mexico statutory scheme to a police power or equal protection analysis (Jurisdictional Statement, Opinion, A8-A14). Appellant makes the erroneous allegation that, as a result of the lower court's opinion, New Mexico has been provided with "carte blanche" power to charge nonresident hunters any amount it desires.

The states have a special power over fish and wildlife within its borders which has long been recognized by the courts:

> A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers. *Toomer* v. *Witsell, supra* (concurring opinion of Frankfurter, J.).

Stemming from this special power, the states have traditionally favored residents in connection with sport hunting license fee requirements. This historical tradition has been approved by the courts which have never denied the power of the states to impose higher license fees for sport hunting on nonresidents.

Footnote continued—

an organization whose membership represents the fish and game agencies of all fifty states. Also the states of Idaho, Colorado, Utah, Wyoming and Oregon appeared individually as amicus curiae and supported New Mexico's position.

Subject to restraints imposed by the Constitution, a state may regulate the taking, subsequent use, and property rights that may be acquired in wildlife. *Lacoste* v. *Dept. of Conservation*, 263 U.S. 545, 549 (1924).

This special power of the states is founded on the dual basis of "trustee or ownership" and "police power". *Kleppe* v. *New Mexico, supra.*[7]

Appellant claims that New Mexico's license fee structure effectively establishes two classes of hunters based solely on residency, and that such classification constitutes invidious discrimination prohibited by the equal protection clause of the Fourteenth Amendment. The lower court succinctly disposed of that contention:

> This test applies so long as the classification is not based on a suspect criteria or does not affect a fundamental right. *Residency is not a suspect criterion*, and the scheme does not penalize recent interstate movement. The travel argument was rejected in *American Commuters* v. *Levitt* [279 F. Supp. 40 (1967), Aff'd 405 F.2d 1148 (1969)] and *Toomer* [*supra*] type restrictions were indicated to be distinguishable from durational residency requirements in *Dunn* v. *Blumstein*, 405 U.S. 330, 340-342 notes 9-13 (1972). (Emphasis added) (Jurisdictional Statement, Opinion, A13).

Appellant further contends apparently, that the lower Court erroneously refused to apply the test of legislative classification (it is assumed Appellant is referring to the

---

7. The Statutory District Court recognized that under either the "trust or ownership" or "police power" theories, New Mexico has the power to manage and conserve its wildlife and to promulgate laws pursuant to that power. The court in its analysis found it unnecessary to choose between these theories (Jurisdictional Statement, Opinion, A12). Therefore, this issue is not before this Court on appeal.

"strict scrutiny" or "compelling state interest" test) under its police power or equal protection analysis, and, instead utilized the more liberal "rational relationship test." The Court stated:

> Sport hunting is not a fundamental right or privilege of national citizenship. There are, therefore, no impediments to applying the rational relationship test. We find the disparity in fees charged nonresidents to be reasonable and within the police power of the state. With the exception of three licenses; Cougar, Barbary Sheep and Bighorn Sheep, the nonresident fee ranges from three to six times the resident fee. We feel the State has made a sufficient showing that nonresidents receive the benefits of state general fund expenditures which justify the fee differential (Jurisdictional Statement, Opinion, A13).

See also *San Antonio School District* v. *Rodriguez, supra.*

When all other issues are disposed of, in reality, Appellant in this appeal merely seeks to have the Court review the fact determination made by the Statutory District Court on the record before it, hardly a substantial federal question.

The legislative acts and practices of the State of New Mexico and its officers enjoy a presumption of regularity, validity and reasonableness. The Supreme Court of New Mexico in reviewing the state's game laws stated:

> Here we have a statute aimed to conserve the property of the state which it holds in trust for the public. It should be given a liberal construction to sustain its validity, and it cannot be set aside unless it clearly violates the organic law of the nation or state. *State* v. *Heffernan*, 41 N.M. 219, 227, 67 P.2d 240, 244 (1936).

E.g. *Rast* v. *VanDeman & Lewis Co.*, 240 U.S. 342 (1916); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945); *New York Rapid Transit Corp.* v. *New York*, 303 U.S. 573 (1938).

Appellant goes to great length to attempt to convince this Court, as he did the Statutory District Court, that the State of New Mexico failed to make a sufficient showing that nonresidents receive the benefits of state general fund expenditures which justify the license fee differential. In his attempt, Appellant seeks to distinguish the tuition cases cited by the lower court in its decision.[8] The principal thrust of Appellant's argument is to urge adoption of the narrow view that, in order to take into account indirect cost benefits from general appropriations provided to other state agencies, the New Mexico Department of Game and Fish and State Game Commission must pay the other agencies for these benefits or "reimburse the State" for these benefits. This view ignores the context in which these cost benefits must be and were considered by the lower court; the classification of residency. The State clearly demonstrated, based upon evidence not objected to by Appellant, that nonresident sport hunters benefit from general fund expenditures expended by other state agencies. Appellant cites no authorities to the effect the cost allocation must be between *state agencies,* rather than between *residents* and *nonresidents*; nor do the cases relied upon by the lower court so hold. On the one hand, there are state residents who have, through various revenue raising means, contributed funds toward the operations of state agencies which preserve, protect and enhance the

---

8. *Starns* v. *Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), aff'd per curiam, 401 U.S. 985 (1971); *Clarke* v. *Redeker*, 259 F. Supp. 117 (1966), cert. den., 396 U.S. 862 (1966); and *Sturges* v. *Washington*, 368 F. Supp. 38 (1973).

wildlife of the state and provide greater opportunities for both resident and nonresident hunters. And, on the other hand, there are nonresidents who do not make the contributions made by residents.

The State only need make a reasonable attempt to achieve partial cost equalization. Mathematical precision is not required (Jurisdictional Statement, Opinion, A13, A14).

Finally, Appellant contends that the lower court, in its consideration of the legitimate state object involved, refused to recognize or consider the fact of the existence of public domain lands and federal funding. As stated, *supra*, the lower court carefully considered these factors and properly found them inapplicable in giving Appellant any constitutionally protected right, which decision is equally applicable in this context

CONCLUSION

In summary, there is no substantial question raised by this appeal. The Statutory District Court properly found that Appellant's alleged recreational right was not a fundamental right recognized as a constitutionally protected privilege and immunity.

The Court did not then find that the state had "carte blanche" power to charge nonresident hunters any amount it desired. Rather, the court subjected the challenged statutory scheme to a police power or equal protection analysis and, on the facts before it, found that the classification involved (residency) was reasonable and rationally related to a legitimate state object (partial cost equalization).

For the foregoing reasons, Appellees respectfully submit that no substantial federal question is raised by this appeal and the judgment of the United States District Court for the District of New Mexico should be affirmed by this Court.

Dated this 2nd day of March, 1978.

VALDEZ, RUSSELL & READ
JAMES H. RUSSELL, JR.
Special Assistant Attorney General
State of New Mexico
P. O. Box 2385
Santa Fe, New Mexico 87501
Telephone (505) 988-2802
Attorney for Appellees